LIBRARY
SUPREME COURT, U. S.

FILED
NOV 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1974.

No. 74-435

ROBERT G. WARD,
*Petitioner,*

v.

PHILADELPHIA ELECTRIC COMPANY,
*Respondent.*

## ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

JOHN J. TIRADELLA,
LISA J. HOLLAGHER,
*Attorneys for Respondent.*

*Of Counsel:*
BALLARD, SPAHR, ANDREWS
& INGERSOLL,
1735 Land Title Building,
Philadelphia, Pennsylvania 19110

International Printing Co., 711 Sansom St., Phila., Pa. 19106 — Tel. (215) 627-2711

## JURISDICTION.

Petitioner states in his Petition that jurisdiction is conferred upon this Court by "28 U. S. C. A. 2873." Title 28 does not contain a section designated as 2873. Petitioner, therefore, has failed to state any basis for this Court to assume jurisdiction of this matter. If this Court has jurisdiction over this case it would be by virtue of 28 U. S. C. § 1257. Under the facts of this case, however, there is no jurisdiction for this Court under § 1257.

## COUNTER STATEMENT OF THE CASE.

Petitioner, Robert Ward, instituted a trespass action in the Court of Common Pleas of Philadelphia County against respondent, Philadelphia Electric Company on June 8, 1962 for injuries allegedly sustained in a motor vehicle accident. In November, 1969, (shortly before the case was scheduled to be tried) a settlement conference took place before the Honorable Joseph E. Gold, of the Court of Common Pleas. Judge Gold recommended that the case be settled for $5,000. A few days thereafter, counsel for the parties involved, with the authorization of their respective clients, agreed to settle the case for $7,500. The Common Pleas Court was then notified of the settlement by the attorney for Ward and the case was removed from the trial list.

In September of 1972, more than two years after receipt of the releases from his attorney, Ward refused to sign the releases and retained new counsel who attempted to place the case on the trial list. Philadelphia Electric Company filed an Answer, claiming that the case was settled, and also filed a Petition for Leave to Pay the Agreed Settlement Amount into Court. A full hearing on this Petition was held before the Honorable G. Fred DiBona of the Court of Common Pleas. Judge DiBona held that the case was indeed settled and directed Philadelphia Electric Company to pay the settlement fund of $7,500 into Court. No demand for a jury trial on the issue of settlement, *vel non*, was made at any time either by Ward or his then counsel, R. Stuart Jenkins, Esquire.

On appeal by Ward, the Superior Court of Pennsylvania affirmed Judge DiBona's decision *per curiam*. The Supreme Court of Pennsylvania, though requested twice by Ward in a Petition for Allowance of Appeal and a Petition for Reconsideration, refused to review the case. The matter is now before this Court on Petition for Writ of Certiorari.

## ARGUMENT.

Rule 19 of the Rules of this Court provides, in part, as follows:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

In the instant case, the Pennsylvania State Courts did not decide *any federal question* and the Petition for a Writ of Certiorari fails to demonstrate the existence of a federal question under the facts or the law. Therefore, the Petition for Writ of Certiorari should be denied.[1]

The central theme of the Petition is that petitioner was denied a trial by jury on the settlement issue in violation of his Seventh Amendment rights. Petitioner, however, never demanded a jury on the issue of settlement in the Court of Common Pleas prior to, or at the time of the hearing before Judge DiBona, and thus waived any right to a jury trial that he might have had. It is a well settled principle of law and procedure in Pennsylvania that "matters not raised in, or considered by, the court below cannot

---

1. Indeed, it is unclear whether this Court even has jurisdiction over this petition. However, since the exercise of sound discretion dictates that the Petition be denied, the jurisdictional question will not be briefed.

be invoked on appeal even though they involve constitutional questions." *Altman v. Ryan*, 435 Pa. 401, 407 (1969). The matter at issue, then, is not whether petitioner was entitled to a jury trial, but whether a state may require that jury trials be seasonably demanded. Clearly, this latter question is not one which ought to be reviewed by this Court.[2]

Petitioner's due process claim is also spurious and the cases cited in his Brief for the proposition that he has been denied his day in court are not applicable to the instant case. Petitioner has had the consideration of a court with respect to the legal and factual issues involved which simply pertain to the question of whether he authorized his attorney to settle his case.

To a large extent petitioner's due process claim overlaps with petitioner's contention that he was entitled to a jury trial. To the extent that it does not overlap, the claim appears to be that Judge DiBona's holding is not supported by the weight of the evidence. It has long been held that this is not a proper subject for review by this Court.

If this case raises due process issues then every case which involves a factual determination does so as well. This Court should not undertake the task of determining whether trial judges correctly weighed evidence, especially where no federal question is involved and where the case originated in a state court. The admonition of Justice Holmes that "[w]e do not grant certiorari to review evidence and discuss specific facts" should be heeded. *United States v. Johnston*, 268 U. S. 220, 227 (1925).

---

2. Petitioner would not have a Seventh Amendment claim even if he had timely demanded a jury. The Seventh Amendment only guarantees a trial by jury in suits at common law. This does not mean that a party is entitled to a jury on every incidental motion or petition. Moreover, it does not offend the Seventh Amendment for a judge to take a case away from a jury in appropriate instances. *Galloway v. U. S.*, 319 U. S. 372, 389 (1943).

## CONCLUSION.

The Superior Court of Pennsylvania, after reviewing the entire record of the Court of Common Pleas and after oral argument by the parties, affirmed *per curiam* the Order of the lower court finding that petitioner authorized his attorney to settle his case, that petitioner had accepted respondent's offer of $7,500 and that, therefore, respondent should be granted leave to pay the settlement fund into the Court. Petitioner then filed his appeal to the Supreme Court of Pennsylvania which refused to review the decision of the Superior Court on two occasions and denied petitioner's request for reconsideration of his appeal. Petitioner now brings this case before this Honorable Court claiming that a Writ of Certiorari should be granted to consider the federal questions involved in the case. Petitioner has failed to demonstrate that a federal question exists and, therefore, respondent, Philadelphia Electric Company, respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JOHN J. TINAGLIA,
LISA J. HOLZSAGER,
*Attorneys for Respondent.*

Dated: November 11, 1974.

*Of Counsel:*
BALLARD, SPAHR, ANDREWS & INGERSOLL,
1035 Land Title Building,
Philadelphia, Pennsylvania. 19110